LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 23 1957
JOHN T. FEY, Clerk

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

---

## No. 83

---

RICHARD McALLISTER,

*Petitioner,*

*vs.*

MAGNOLIA PETROLEUM COMPANY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

---

## BRIEF ON THE MERITS FOR PETITIONER, RICHARD McALLISTER

---

MANDELL & WRIGHT,
*707 South Coast Bldg.,*
*Houston 2, Texas.*

*Of Counsel:*

ARTHUR J. MANDELL

# INDEX

## SUBJECT INDEX



## CITATIONS

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1957**

---

## No. 83

---

RICHARD McALLISTER,

*Petitioner,*

*vs.*

MAGNOLIA PETROLEUM COMPANY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

---

## BRIEF ON THE MERITS FOR PETITIONER, RICHARD McALLISTER

---

### Opinions Below

The judgment of the District Court of Dallas County, Texas, rendered on the 25th day of April, 1955 (R. 381).

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District, rendered on the 1st day of March, 1956 (R. 421-436), and is reported in 290 S.W. (2d) 313.

## Jurisdiction

This cause is presently before the Court on a writ of certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, granted by this Court on the 25th day of February, 1957. The petition for the writ was timely filed within ninety (90) days from October 3, 1956, the date on which Petitioner's Application for Rehearing was denied by the Supreme Court of Texas, the highest court of Texas in which a decision herein could be had. The jurisdiction of this Court rests upon Title 28 U.S.C.A. Sec. 1257(3).

## Statutes Involved

The statutes involved are the Jones Act, 46 U.S.C.A., Sec. 688, et seq., reading as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action *all statutes* of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply * * *" (all emphases ours.)

and the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any

defect or insufficiency, due to its negligence, in its * * * equipment * * *."

"That in any action brought * * * by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risk of his employment in any case where the violation * * * of any statute enacted for the safety of employees contributed to the injury or death of such employee." Sec. 54.

The Federal Employers' Liability Act further provides as follows:

"No action shall be maintained under this chapter unless commenced within three years from the date the cause of action occurred." Sec. 56 (1939 Amendment). This amendment has been held applicable to seamen's actions, *Cox* v. *Roth*, 348 U.S. 207.

Texas Rules of Civil Procedure provide:[1]

*Rule 273:*

"* * * The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact."

---

[1] In our Texas Rules of Civil Procedure the jury simply finds the facts by answering the issues submitted to them, and they must never be advised of the effect of their answers to the questions or the effect their verdict may have upon the final judgment. Texas Rules of Civil Procedure, Rules 273 through 286. *Fisher* v. *Pace*, 69 S.Ct. 425, 336 U.S. 155.

*Rule 274:*

"A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection."

*Rule 277:*

"* * * In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge."

*Rule 285:*

"The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their foreman, communicate with the court, either verbally or in writing. If the communication is to request further instructions, Rule 286 shall be followed."

*Rule 286:*

"After having retired, the jury may receive further instructions of the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their foreman state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the charge. Additional argument may be allowed in the discretion of the court."

## Questions Presented for Review

1. Is a seaman, who suffers personal injuries in the course of his employment by reason of unseaworthiness of the vessel or of its appliances, bound by the two year statute of limitation prevailing in the state where the cause of action was instituted, Vernon's Civil Statutes of Texas, Art. 5256, or is the three year statute of limitation enacted by Congress controlling? Title 45, U.S.C.A., Sec. 56.

2. In view of Congressional enactment of a three year limitation statute in seamen's actions for personal injuries, does not the state court's imposition of its own limitation statute impair and destroy the uniform application of the maritime rights and duties throughout the nation?

3. May a state court by its practice and procedure substantially alter or deny the rights of the litigant as those rights are established in federal law?

4. Whether the trial court's submission of issues numbers 3 and 14 and definitions of unseaworthiness (R. 359 and 362) effectively denied petitioner's right to recovery under the seaworthy doctrine.

5. If any analogy to a statute of limitation is to be followed in a seaman's case for personal injuries sustained by him during the course of his employment, should not the three year period of limitation enacted by Congress control rather than the shorter limitation period of the state in which the cause of action is brought?

## Statement

On the 27th day of August, 1953, and within three years of October 19, 1950, Petitioner filed his suit against this employer in the district court of Harris County, Texas, which was (removed to the district court of Dallas County, Texas, pursuant to Respondent's plea of privilege,) seeking compensatory damages for personal injuries sustained on October 19, 1950. Petitioner, an engineer, and a member of the crew of the M/V J. C. Stephens, owned and operated by Respondent, alleged that, while the vessel was on navigable waters of the United States, because of Respondent's negligence and the unseaworthy condition of the windows over the stairs leading from the lounge to the galley and the deck above the galley, water came through said portholes, or windows, and through the deck onto the stairs he was thereby caused to fall, sustaining injuries. The Log Book entry substantiated Petitioner's version of the occurrence (R. 345).

Petitioner reported the injury but continued working sporadically with intermittent back pains in varying degrees of severity. He was treated by a physician from time to time; and, finally, some two years later was examined by a Doctor Battalora, a specialist in orthopedics (R. 41), at New Orleans, Louisiana, who then diagnosed Petitioner's condition as serious, painful and disabling injuries to his back designated as one or more herniated nucleus pulposis (ruptured discs in between the vertebrae). Because of Petitioner's continued difficulties and pain in his back which caused him finally to be unable to discharge his duties as a seaman aboard the employer's vessel, or vessels, on the 6th day of July, 1953, Respondent gave him a certificate entitling him as an injured seaman, to enter the United States Public Health Service facilities (Marine Hospital, Galveston, Texas). After being discharged from the hospital he consulted an attorney and this suit was filed.

At the conclusion of the evidence before a jury, the trial judge submitted Special Issues, as required by the Texas Rules of Civil Procedure, consisting of specific issues raised by the pleadings and the evidence. The jury in response to such issues found:

(A) That Petitioner received an injury to his body while attempting to walk down the stairs leading from the lounge to the galley (Issue No. 1) (R. 358)

(B) That the portholes over said stairs (Issue No. 2) (R. 359), and

(C) The deck above the galley (Issue No. 13) (R. 362) were not watertight.

Petitioner contended that such findings constituted, as a matter of law, unseaworthiness of such windows, or portholes, and of said deck above the galley, and that such issues should have been followed by issues inquiring of the jury whether such conditions proximately caused Petitioner's injuries.

Over timely objections by Petitioner's counsel, in conformity with the Texas Rules of Civil Procedure (R. 370-374), the Court improperly and in denial of Petitioner's federally created rights did not submit to the jury whether the failure to have watertight windows, or portholes, over the stairs and watertight decks proximately caused his injuries, but instead submitted Special Issues 3 (R. 359) and 14 (R. 362) which asked the jury to find whether or not these conditions, lack of watertight portholes and watertight deck, made "the crew ship" in question unseaworthy. In connection with such issues (3 and 14) the Court instructed the jury that to constitute unseaworthiness, each of these conditions stated separately must render

> "The vessel not reasonably fit for the purpose for which *it* was being used."

The submission of Special Issues Numbers 3 and 14 placed a greater burden upon Petitioner than the one required by the applicable Federal Law in that Issues numbers 3 and 14 and the definition of unseaworthiness were so worded that the jury had to believe, and Petitioner was required to prove that the failure to have watertight portholes and deck made the ship unfit to navigate upon the Gulf of Mexico or on other navigable waters at the time of Petitioner's injuries. So unreasonable, confusing and improper were Issues numbers 3 and 14, and the definition, that the jury, in an obvious effort to understand such issues, within fifteen minutes after retirement to consider their verdict, requested the Court to clarify the issues by sending out, in writing, the following inquiry (R. 419):

> "Judge Long: In Special Issue No. 3 is the term 'unseaworthy' referring to the vessel as a whole, or the three windows on the portside?"
>
> Signed James H. Brown, Foreman.

Petitioner then requested the Court to answer the jury's inquiry and submitted to the Court an answer in writing as follows:

> "In reply to your question, you are instructed that the term 'unseaworthy' as given to you in connection with Special Issue No. 3 refers to the three windows on the port side" (R. 420).

The Court refused to reply to the jury's inquiry, refused to submit Petitioner's requested answer, and instead sent to the jury the following reply (R. 420):

> "The Court's charge contains definitions and instructions. The Court can instruct you no further."

In view of the Court's instructions and its refusal to answer the jury's most intelligent and cogent question, the jury in order to answer Issues Numbers 3 and 14 affirmatively (in favor of Petitioner) had to believe that these conditions inquired about in Issues 2 and 13 rendered the vessel *as a whole* unseaworthy for the use to which *it* (the vessel) was being put. If there is any doubt about the trial court having reference to the ship as a whole, such doubt is dispelled in the proximate cause Issues Numbers 4 (R. 359) and 15 (R. 362), since it particularly calls the jury's attention to the unseaworthiness of "the crew ship" in question. Since no contention was made, nor proof offered that the vessel was unable to navigate upon the Gulf of Mexico or other navigable waters simply because the windows over the stairs leading from the lounge to the galley and the deck above the galley were not watertight, the jury had no alternative but to answer Special Issues 3 and 4 in the negative, i.e., that these conditions did not make the vessel *as a whole* unseaworthy. The issues of proximate cause (Issues 4 and 15, R. 359, 362) being conditioned upon an affirmative answer to Issues 3 and 14, were not answered. Thus, Petitioner was denied

(a) His constitutional right to a jury trial on the proximate cause issues, and

(b) His right under the applicable Federal Law to compensatory damages on account of the failure to furnish watertight windows (unseaworthy conditions) which proximately caused his injuries.

In answer to the damage Issue No. 34 (R. 367), the jury found Petitioner to have been damaged in the sum of Thirty-two Thousand Five Hundred Dollars ($32,500.00). The jury absolved the defendant of negligence, but notwithstanding the finding of unseaworthiness, i.e., windows over the stairs leading from the lounge to the galley and

the deck above the galley not being watertight, the Court entered judgment for Respondent denying Petitioner compensatory damages. From this judgment Petitioner took an appeal to the Court of Civil Appeals.

The Court of Civil Appeals affirmed the judgment of the trial court without considering any of the questions presented but sustained the trial court's judgment denying compensatory damages on the ground that the two year Texas limitation statute applied (R, 421) in an action where a seaman sues for injuries sustained in the course of his employment by reason of unseaworthiness.

## PROPOSITION NUMBER ONE

**A seaman who suffers personal injuries in the course of his employment by reason of unseaworthiness of the vessel or its appliances or by reason of negligence is not bound by the two year statute of limitation of the state wherein the cause of action is brought but the three year limitation statute enacted by Congress controls.**

### Argument and Authorities

This case brings before this Court a most important question of law never directly passed on by this Court. The Texas Court of Civil Appeals ruled that the statute of limitation of the state wherein the cause of action is instituted controls rather than the limitation statute enacted by Congress. The question however was especially left open in *Engel* v. *Davenport,* 46 S.Ct. 410, 271 U.S. 33, 70 L.Ed. 813, and we submit contrary to the decisions of this Court in *Cox* v. *Roth,* 75 S.Ct. 242, 348 U.S. 207 (5th Cir.), *Baltimore Steamship Co.* v. *Phillips,* 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, *Panama Railway Co.* v. *Johnson,* 44 S.Ct. 391, 294 U.S. 375; *Seas Shipping Co.* v. *Sieracki,* 149 F.2d 98, 328 U.S. 85, 66 S.Ct. 872, and *Alaska Steamship Co.* v.

*Petterson*, 205 F.2d 478, 347 U.S. 496, 74 S.Ct. 601, 98 L.Ed. 798.

In this case the court has before it two primary and important questions:

(1) To determine the proper period of limitation in a case such as this; and,

(2) May a state by its practice alter or deny the federally created right of a litigant.

Since *Engel* v. *Davenport, supra*, specifically left the first question open it is now before this Court for a specific answer. The second question this Court has specifically answered it in *Garrett* v. *Moore-McCormack Co., Inc., et al.*, 63 S.Ct. 246, 317 U.S. 239, holding that a state may not by its practice alter or deny the rights of such litigant stating as follows:

> "If by its practice the state court were permitted substantially to alter the rights of either litigant, as these rights were established in Federal Law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure."

Other cases by this court reiterating this established principle are *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105; *St. Louis I. M. & S. R. Co.* v. *Taylor*, 210 U.S. 281, 28 S.Ct. 616.

The Texas Court of Civil Appeals misconceived the broad principles of the Jones Act—not only as written but as interpreted by many decisions of this Court. The act reads as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *" Title 46, Sec. 688, U.S.C.A.

Section 56, Title 45 U.S.C.A. (Railway Employees' Act) reads as follows:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." (1939 Amendment.)

This section has been held applicable to seaman's suit for personal injuries. *Cox* v. *Roth*, 348 U.S. 207.

Since the passage of the Jones Act, there is no decision in the books, until the Texas Court of Civil Appeals in this case, which holds that a *seaman*, injured during the course of his employment, whether through negligence or unseaworthiness, must file his suit within the period of the limitation statute of *the state* wherein the cause of action is brought. On the contrary, all the decisions hold the benefits conferred on seamen under the Jones Act are equally applicable to the pre-existing causes of action under the General Maritime Law, just as the benefits a seaman had under the Maritime Law, became a part of the provisions of the Jones Act, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872. On page 874 this Court stated:

"At the outset we may dismiss the first contention. It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court. Carlisle Packing Co. v. Sandager, 259 U.S. 255, 259, 42 S.Ct. 475, 476, 66 L.Ed. 927; Garrett v. Moore-McCormack

Co., 317 U.S. 239; Rhones v. Socony-Vacuum Oil Co., 37 F.Supp. 616."[2]

So intermingled are these rights that the failure to assert one in a cause of action for personal injuries based on either negligence or unseaworthiness forever bars the seaman from asserting the other in a separate or subsequent cause of action. *Baltimore Steamship Company* v. *Phillips*, 47 S.Ct. 600, 274 U.S. 316, 71 L.Ed. 1068. Indeed, the very language of Section 688 clearly indicates such intention since said Section does not deal only with rights but also with remedies, thus:

> "Any seaman who suffers personal injuries in the course of his employment, etc., and * * * in such action *all* statutes of the United States modifying or extending the common-law rights or remedy in cases of personal injury to railway employees shall apply."

It is to be noted the statute does *not* say—Any seaman who shall suffer a personal injury in the course of his employment by reason of negligence. Nothing in this statute limits recovery only upon a showing of negligence, nor can it conceivably be interpreted to mean that this right to sue for negligence is not in addition to the rights theretofore enjoyed by seamen. *Arizona* v. *Anelich*, 56 S.Ct. 712,

---

[2] Nothing in 28 U.S.C.A. Sec. 41(3) is to the contrary. The section provides that federal district courts shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it * * *." This does not mean that where suit is brought at law the court is restricted to the enforcement of common-law rights. *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S.Ct. 501, 503, 62 L.Ed. 1171; *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 387, 388, 44 S.Ct. 391, 394, 68 L.Ed. 748; *Panama Refining Co.* v. *Vasquez*, 271 U.S. 557, 560, 561, 46 S.Ct. 596, 597, 70 L.Ed. 1085, "When a cause of action in admiralty is asserted in a court of law its substance is unchanged." *Panama Agencies Co.* v. *Franco*, 5 Cir., 111 F.2d 263, 266.

298 U.S. 124, hold that the Act is to be liberally construed, and is to be interpreted in harmony with the established doctrine of maritime law *of which it is an integral part.*

It is submitted that the answer to the first question can be found in *Cox* v. *Roth*, 216 F.2d 76 (5th Cir.), affirmed 75 S.Ct. 242, 348 U.S. 207. The *Cox* case involved a Florida limitation statute applicable against estates of decedents which, under the Florida law, was six months. The lower court held such statute applicable and dismissed the suit.

> "In Lindgren v. United States, *supra* [281 U.S. 38, 50 S.Ct. 211], the court made these pertinent observations in reference to the Jones Act. It 'establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States * * *; and that, as it covers *the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.*'"

Judge Hutcheson, in his dissent, states:

> "We take it to be now well settled that when a common law action is brought, whether in a federal or in a state court, to enforce a right peculiar to the law of admiralty, the substantive law to be applied is the same as would be applied by an admiralty court. Chelentis v. Luckenbach S.S. Co., Inc., 247 U.S. 372, 38 S.Ct. 501, 503, 62 L.Ed. 1171, * * * and other cases."

This Court in affirming the 5th Circuit decision, 75 S.Ct. page 242, 348 U.S. 207, in discussing the applicability of

the three year limitation statute, Sec. 56, Title 45 U.S.C.A. said:

> "* * * Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting."

By "admiralty setting" the Court could not have meant anything else but causes of action cognizable in admiralty as applicable to seamen, which by necessity includes a cause of action for unseaworthiness.

This Court further said:

> "The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The only case brought by a seaman in which the precise question here was ever raised or discussed is *Engel* v. *Davenport*, 46 S.Ct. 410, 271 U.S. 33, 70 L.Ed. 813. Engel, a seaman, brought an action at law against the shipowner to recover damages for personal injuries suffered aboard a vessel in April, 1951. The suit was brought within the then existing two year period of limitation prescribed by the Jones Act. Davenport demurred to the complaint on the ground that the cause of action was barred by the California one year limitation statute, which the trial court sustained. The Supreme Court of California affirmed, 220 Pac. p. 710. Engel brought certiorari, contending that the suit, founded, as it was, on Section 33 of the Merchant Marine Act, Title 46, Sec. 688, U.S.C.A., under which state courts were given concurrent jurisdiction, was timely filed, insisting that Section 56 of Title 45 incorporated in the provisions of the Merchant Marine Act provided that a

seaman's suit for personal injuries could be commenced within the then existing two-year limitation statute, irrespective of state statutes. This Court reversed the California court, stating as follows:

> "It is settled by the decision in Panama Railroad v. Johnson, 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748, that Section 33 of the Merchant Marine Act is an exercise of the power of Congress *to alter or supplement the maritime law by changes that are country-wide and uniform in operation;* That it brings *into the maritime law* new rules drawn from the Employer's Liability Act and its amendments—adopted by the generic reference to 'all statutes of the United States modifying or extending the common law *right or remedy* in cases of personal injuries to railway employees' and 'extends to injured seamen a right to invoke at their election, either the relief accorded by the old rules or that provided by the new rules'; * * *
>
> "The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action of law could have been maintained prior to the Merchant Marine Act. Carlisle Packing Co. v. Sandanger, 42 S.Ct. 475, 259 U.S. 255, 66 L.Ed. 927; *and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable.*"

This Court left this specific question open, and there are no decisions holding that *seamen* suing their employers for personal injuries caused by reason of unseaworthiness must do so within the limitation period of the state wherein the cause of action is brought. True, there are a number of

cases holding that longshoremen bringing third party actions against a shipowner for unseaworthiness and/or negligence must do so within the limitation period of the state wherein the cause of action is brought, but there the necessary element of employer-employee relationship required by Section 688 is absent. Therefore, cases in which longshoremen are involved are not helpful, nor applicable.

In *Ran* v. *Atlantic Refining Co.*, 87 F.Supp. 853, the Court held that a cause of action for personal injuries by reason of unseaworthiness may be brought within three years, stating as follows:

> "A breach of the duty to provide a seaworthy vessel manned by a competent crew occurs when a seaman is injured as a result of unseaworthiness or negligence. In the instant case, the plaintiff's right to damages for personal injuries suffered from this breach of this duty arose in July or August of 1944 but was extinguished forever in July or August of 1947."

While this Court has not squarely passed on this question of limitation, there are numerous decisions holding that the Jones Act cannot be used to restrict seamen's rights, that the public policy of the United States as expressed by Congressional intent was to enlarge those rights and to draw into the Act, and make part of such Act the rights theretofore enjoyed by the seaman. See *Arizona* v. *Anelich*, 56 S.Ct. 707, 298 U.S. 110, 80 L.Ed. 1075, and *Beadle* v. *Spencer*, 56 S.Ct. 712, 298 U.S. 124, 80 L.Ed. 1082.

In the *Arizona* v. *Anelich* case, *supra*, the employer-shipowner contended that where a seaman sued under the Jones Act, incorporating as it does the Federal Employers' Liability Act, the employer-shipowner (prior to the 1939 amendment abolishing the defense of assumption of risk) might interpose the defense of assumption of risk. The

employer's contention being, since the Jones Act did not specifically abolish the defense of assumption of risk, even though under the General Maritime Law it is not a defense, a seaman who chose to proceed under the Jones Act, like any other litigant under the Federal Employers' Liability Act, subjects himself to the employer's defense of assumption of risk. This Court rejected such contention on the ground that the rights and remedies which a seaman has under the old Admiralty Rules were enlarged and became a part of these new rules of the Jones Act and became an integral part of the Act, stating as follows:

> "Like considerations, and others to be mentioned, require a like conclusion with respect *to the modified and in some respects enlarged liability imported unto the maritime law by the Jones Act.* The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. *Its purpose was to enlarge the protection, not to narrow it.* Cf. Chelentis v. Luckenbach S.S. Co., *supra.* Its provisions, like others of the Merchant Marine Act (41 Stat. 988), *of which it is a part,* are to be liberally construed to attain that end. See Cortes v. Baltimore Insular Lines, 287 U.S. 367. * * * and are to be interpreted in harmony with *the established doctrine of maritime law of which it is an integral part.*"

To hold that a seaman may bring a cause of action grounded in negligence within three years under a Federal statute, but that one grounded on unseaworthiness must be brought within the time prescribed under a state statute, which in Texas is two years, would destroy the uniformity of the application of the Maritime Law; destroy the remedy specifically provided for by Congress in Section 688, Title 46, and make a judicial chameleon of the substantive rights of seamen, changing its color in accordance with the geo-

graphical location in which the suit is brought, contrary to *Garrett* v. *Moore-McCormack Co., Inc.*, 63 S.Ct. 246, 317 U.S. 239, 87 L.Ed. 239. In that case, the court said that when procedural matters tend to negate or destroy a federally created right such procedure will not be followed to create such a result, stating (p. 249):

> "We do not have in this case an effort of the state court to enforce rights claimed to be rooted in state law. The petitioner's suit rested on asserted rights granted by federal law and the state courts so treated it. Jurisdiction of the state court to try this case rests solely upon Sec. 33 of the Jones Act and upon statutes traceable to the Judiciary Act of 1780 which in 'all civil causes of admiralty and maritime jurisdiction' saves to suitors 'the right of common law remedy where the common law is competent to give it.' These statutes authorize Pennsylvania courts to try cases coming within the defined category. Whether Pennsylvania was required by the acts to make its courts available for those federal remedies, or whether it could create its own remedy as to maintenance and cure based on local law, we need not decide; for having voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give to petitioner *the full benefit of federal law* and if so whether it failed to afford that benefit.
>
> "There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones Act actions. * * *
>
> "It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try

actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is *in the national*, not the state, governments. IF BY ITS PRACTICE THE STATE COURT WERE PERMITTED SUBSTANTIALLY TO ALTER THE RIGHTS OF EITHER LITIGANT, AS THOSE RIGHTS WERE ESTABLISHED IN FEDERAL LAW, THE REMEDY AFFORDED BY THE STATE WOULD NOT ENFORCE, BUT WOULD ACTUALLY DENY, FEDERAL RIGHTS WHICH CONGRESS, BY PROVIDING ALTERNATIVE REMEDIES, INTENDED TO MAKE NOT LESS, BUT MORE SECURE. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * *

"And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."

In the *Garrett* case, *supra*, the defendant, Moore-McCormack Co., introduced in evidence an instrument signed by Garrett releasing all claims in the very cause of action sued upon. Garrett neither by pleading nor proof sought to overcome the effect of such release. The Court granted an instructed verdict because, under Pennsylvania practice, like Texas, the burden was on the plaintiff to overcome the consequences of his release. Strictly a procedural matter, yet, this Court reversed the Pennsylvania Court holding that by such procedural matter substantive rights

of the seamen had been denied. The Court said that, in conformity with federal procedure applicable to such cases, the burden was upon the person who interposed the defense of a release to prove that it was fairly entered into.

Moreover, in the very same case, and in many cases prior to and since the *Garrett* case, the Supreme Court has held that the old maritime rules and the Jones Act are to be liberally construed to carry out their full purpose, which was to enlarge admiralty's protection to its wards. *Warner* v. *Goltra*, 293 U.S. 155, 156, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254; *The Arizona*, 298 U.S. 110, 123, 56 S.Ct. 707, 711, 80 L.Ed. 1075.

Other cases in which the Court has held that states' procedural matters cannot be used to negate or destroy a federally created right are:

*Central Vermont R. Co.* v. *White*, 35 S.Ct. 865, 238 U.S. 507;

*Southern Pacific Company* v. *Jensen*, 37 S.Ct. 524, 244 U.S. 205;

*Chelentis* v. *Luckenbach S.S. Co.*, 38 S.Ct. 501, 247 U.S. 372;

*Panama R. Co.* v. *Johnson*, 44 S.Ct. 391, 264 U.S. 375.

In *Panama R. Co.* v. *Johnson*, 264 U.S. 375, 44 S.Ct. 391, this Court stated as follows:

"After the decision (Chelentis v. Luckenbach) the section was re-enacted in the amended form hereinabove set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.' In that form it makes applicable to personal injuries suffered by seamen in the course of their employment 'all statutes of the United States modifying or extending the

common-law right or *remedy* in cases of personal injury to railway employees.' Thus its origin, environment and subject matter show that it is intended to, and does, bring the rules to which it refers into the maritime law. * * *

"A more reasonable view consistent with the spirit and the purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for such injuries,' the emphasis being on *the object of the suit* rather than the jurisdiction in which it is brought.

"The statute is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. *Without question this is a matter which falls within the recognized sphere of the maritime law*, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in nonmaritime service. But, as Congress is empowered by the constitutional provision to alter, qualify *or supplement* the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, *if the change be country-wide and uniform in operation.* Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common law side of the courts—that is to say, through proceedings in personam according to the course of the common law."

The Jones Act was passed in order to provide for the promotion and maintenance of the American Merchant

Marine. In that form it makes applicable to *personal injuries* suffered by seamen in the course of their employment all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees. Again, as stated by the Court in *Panama Ry. Co.* v. *Johnson:*

> "Thus its origin, environment and subject-matter show that it is intended to, and does, bring the rules to which it refers *into the maritime law.* * * *
>
> "The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts *has a uniform operation, and neither is nor can be deflected therefrom by local views of common law rules.*"

This Court in *Just* v. *Chambers, et al.,* 61 S.Ct. 687, 312 U.S. 687 again liberally interpreted the Jones Act, stating as follows:

> "With respect to maritime torts we have held that the state may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is *not hostile to the characteristic features of the maritime law or inconsistent with federal legislation.*"

In *Engel* v. *Davenport, supra,* the Court cites the decision of *Panama R. Co.* v. *Johnson,* stating as follows:

> "It is settled by the decision in Panama Railroad v. Johnson, 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748, that section 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employers' Liability Act

and its amendments—adopted by the generic reference to 'all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees'—."

This Court has permitted a recovery for death under the Federal Employers' Liability Act for the violation of the absolute duties created by the Safety Appliance Act and the Boiler Inspection Act. *O'Donnell, Admn.* v. *Elgin, Joliet & Eastern Ry.*, 338 U.S. 384, 70 S.Ct. 200, pages 390-394; *Lilly* v. *Grand Trunk Railway*, 317 U.S. 481, page 485. It is most difficult to find any difference between the absolute liabilities created by the Safety Appliance Act, the Boiler Inspection Act, and the absolute liability created by the General Maritime Law with respect to a vessel's appliances.

The Safety Appliance Act was enacted in 1893 to take effect after January 1, 1898 (27 Stat. at L 531, 45 U.S.C.A. 1-16) long before the passage of the Federal Employers' Liability Act, Title 45, Sec. 51, et seq., which was not enacted until 1909. Like unseaworthiness, the violation of the Safety Appliance Act imposes a species of liability without fault. This Court has held that railroad workers suing under the Federal Employers' Liability Act can recover compensatory damages by showing a violation of the Safety Appliance Act, i.e., liability without fault. *St. Louis Iron Mountain & Southern Ry. Co.* v. *May Taylor*, 210 U.S. 281, 28 S.Ct. 616; *Chicago Burlington & Quincy Ry. Co.* v. *United States*, 220 U.S. 559, 31 S.Ct. 612; *Delk* v. *St. Louis and San Francisco Ry. Co.*, 220 U.S. 580, 31 S.Ct. 617. Other cases followed but it was not until *O'Donnell* v. *Elgin Joliet & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200 that this Court finally swept away the confusion that might theretofore have existed and unequivocally declared that cases involving safety appliance violations are properly enforced

through a suit under the Federal Employers' Liability Act even though not predicated upon negligence at all and that they need not be artificially forced into the mold of negligence actions. *Baltimore & Ohio Ry. Co.* v. *Jackson*, 77 S.Ct. 842. The opinion of the Court begins as follows:

> "This is a suit for damages arising from an injury suffered by a section foreman of the petitioner while operating a motor car that was towing a push truck on petitioner's tracks. It was brought under the Federal Employers Liability Act, 45 U.S.C.A. 51; et seq. The *sole* question is whether such vehicles when used in the manner here are within the coverage of the Safety Appliance Acts."

It ought to be perfectly clear that if in a violation of the Safety Appliance Act which does not concern itself with negligence at all, causing damage or death, compensatory damages may be recovered for the consequences of such violation by a suit through the Federal Employers' Liability Act, which has been from time to time termed the "Negligence Statute" a cause of action for unseaworthiness may likewise be enforced through Section 688, Title 46, U.S.C.A. (Jones Act) which receives its breath from the provisions of the Federal Employers' Liability Act. It would be unrealistic to make a distinction between the two situations and contrary to the intent expressed by this Court in *Arizona* v. *Anelich* (247 U.S. 372, 384, 38 S.Ct. 501-503), which specifically holds that the Jones Act merely enlarged the liability which it imported into the maritime law.

> "Its purpose was to enlarge the protection, not to narrow it. Chelentis v. Luckenbach S.S. Co., supra. Its provisions, like others of the Merchant Marine Act (41 Stat. 988), of which it is a part, are to be liberally

construed to attain that end," citing *Cox* v. *Roth*, 348 U.S. 207, 53 S.Ct. 173,

in which this Court expressed the broad application of the Jones Act as follows:

> "* * * Rather it means that those contingencies against which Congress has provided to insure recovery to railroad employees should also be met in the *Admiralty setting.*"

As stated in *Markham* v. *Cabell*, 326 U.S. 406, on page 409,

> "The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes * * * The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The law is settled that a cause of action for negligence may be joined with a cause for unseaworthiness. See:

*McCarthy* v. *American-Eastern Corp.*, 175 F. (2d) 724, cert. den. 338 U.S. 939, 70 S.Ct. 144;

*Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 172 F. (2d) 601; cert. den. 337 U.S. 959, 69 S.Ct. 1534;

*Getman* v. *Carnegie-Illinois Steel Corp.*, 156 F. (2d) 977, cert. den.;

*Pate* v. *Standard Dredging Corp.* (5th Circuit), 193 F. (2d) 498.

In the *McCarthy* case, *supra*, the Court stated as follows:

> "Prior to the passage of the Jones Act, unless there was diversity of citizenship a seaman was compelled

> in the federal court to assert his cause of action for injuries in a suit in admiralty in which there was no jury trial. It was the purpose of the 'election' clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action of law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of $3,000.00 * * * ".

The Opinion of the Honorable Court of Civil Appeals in effect restricts these rights by applying the shorter period of the state statute of limitations instead of following the three year statute enacted by Congress. Such decision destroys the uniform application of the maritime law, contrary to *Garrett* v. *Moore-McCormack Co.*, *supra*, and other cases decided by this Court.

## PROPOSITION NUMBER TWO

**Congress having enacted a three year limitation statute applicable to "any seaman who shall suffer personal injuries in the course of his employment has preempted the field, and if any analogy is to be followed the federal rather than the state statute is to govern.**

### Argument and Authorities

In any event Congress having enacted a statute providing a three year period of limitation within which seamen sustaining personal injuries during the course of their employment may file suit for compensatory damages, if there is to be any analogy, the three year period of limitation provided for in the Jones Act should be followed and not the

limitation period of the state wherein the cause of action is brought.

The authorities hereinabove cited that the application and administration of the maritime law and rights having their roots in the Constitution of the United States and the Federal Law, must be uniformly administered, apply with equal force to Proposition Number Two. It would be inconceivable to think that two seamen receiving personal injuries aboard the same vessel under the same circumstances, arising out of the same occurrence, one living in Texas with a two year limitation statute and one in New York with a three year limitation statute, both filing suits in their respective states where jurisdiction can be obtained against the same shipowner, both having been injured by reason of the unseaworthiness of the vessel, both having brought their cause of action some two and one-half years after the injury occurred, should receive different treatment because they live in different states. If the three year limitation period provided for in the Jones Act is held not to be applicable, neither by reason of its three year statutory provision nor by reason of its application by analogy under the doctrine of laches, a seaman injured in New York may recover but the one who lives in Texas may not even though both have absolute grounds for the application of the doctrine of laches rather than the harsh rule of limitation. This would make the administration of the rights of seamen injured by reason of a maritime tort dependent upon a geographical location within the United States, making the Courts judicial chameleons, changing their hues and colors with the topography of the area in which they find themselves, contrary to all legal pronouncements applicable to such a situation and the particularly condemnation of *Erie* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817.

Petitioner by trial amendment (R. 355) allowed by the court, pleaded facts excusing the delay and showing no

prejudice. We believe that the period of limitation provided for in the Jones Act is paramount and controlling; but even if not, then Congress, having acted in this field, announced the public policy of the United States, the limitation period enacted by Congress should be followed. *Commonwealth of Pennsylvania* v. *Nelson*, 350 U.S. 497, 76 S.Ct. 477. In this case, as a matter of law, the evidence completely overcomes any plea of laches or limitation. *Panama R. Co.* v. *Gardner*, 342 U.S. 29, 72 S.Ct. 12, 96 L.Ed. 31. If there ever has been a case where there is an excuse for delay, and where no prejudice resulted to Respondent by reason of any delay, this is the case. The facts show that after the injury of October 19, 1950, Petitioner sought medical aid, was unable to get it (R. 40 through 43), even though under the law Respondent was duty bound to furnish it. *Cortez, Adm.* v. *Baltimore Insular Line*, 287 U.S. 387, 53 S.Ct. 173, 77 L.Ed. 368. Respondent even refused to buy him a supporting brace and Petitioner had to buy it himself (R. 240 through 241). Petitioner was kept in Respondent's employ until August of 1953, when finally he had to be hospitalized (R. 241). At the trial of the case every single employee who was a member of the crew of the vessel at the time Petitioner was injured was present in Court and testified (R. 247 through 248).

Superintendent Rhodes testified as follows:

"Q. The same employees who were employed on board the vessel on October 19, 1950, sometime prior to that time or shortly sometime thereafter, are still employed by the Magnolia Petroleum Company with the exception of Mr. McAllister?

A. That is correct, they are.

Q. So that all the people who may have knowledge or should have knowledge of the situation that existed in that area are still available in the employ of the employer at the present time?

A. Those members of the boat crew, certainly they are.

Q. They consist of Captain Dressel, Captain Rosson?

A. Yes.

Q. Mr. Ashton, the deckhand?

A. Yes, sir.

Q. And the other deckhand was who?

A. I don't remember exactly.

Q. Mr. Liskey?

A. I believe Mr. Liskey is still in our employ."

Under the authorities, laches and limitation would be no defense under these facts. This is especially so in Texas where we have a blended system of law and equity. Vernon's Annotated Civil Statutes, Texas. Art. 1913.[3]

*Walker* v. *Benjamin Foster*, 92 F.Supp. 402, 1950 A.M.C. p. 1813;

*United States* v. *Alex Dussel Iron Works, Inc.*, 31 F.2d 535;

*John F. LeGate* v. *SS. Panamolga*, 221 F. (2d) 689;

*Art Metal Construction Co.* v. *Lehigh Structural Steel Co.*, 116 F. (2d) 57;

*Gardner* v. *Panama Railway Co.*, 342 U.S. 29, 76 S.Ct. 12.

The authorities cited under Proposition Number One, we believe make it crystal clear that at least by analogy the limitation provided for in the Jones Act is applicable to the case at Bar. In any event, the State limitation statute may not be mechanically applied to a suit by a seaman

[3] "Subject to the limitations stated in this chapter, the district court is authorized to hear and determine any cause which is cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them."

injured by reason of unseaworthiness. *Finley* v. *United States*, 244 F. (2d) 125. In the *Finley* case suit was brought by a shipyard employee against the United States under the Clarification Act, Title 45, Sec. 745, extending the time limited by the suits in Admiralty Act for commencing suit against the United States to one year after December 13, 1950. In that case a longshoreman was injured on May 19, 1947. He employed some attorneys who began two actions in his behalf in May of 1948. These actions were brought against the wrong defendants and complaints were never filed. Claimant changed counsel who filed his action on November 30, 1949, in the Supreme Court of New York against the Marine Transport Lines, Inc., the then General Agents of the United States. That suit was brought against the Agent under authority of *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471, and *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534. This Court in *Cosmopolitan Shipping Company* v. *McAllister*, 337 U.S. 783, 69 S.Ct. 1317, held that a General Agent would not be liable for the acts of the civil-service master and crew employed by the United States. In order to correct this inequitable dilemma and to provide a remedy Congress passed the Clarification Act. That Act, among other things, required as a condition precedent to a suit against the United States that the suit improperly filed against a general agent to have been *timely* commenced and thereafter dismissed solely because improperly brought against any person engaged by the United States to manage or conduct the vessel. Finley commenced the actions in the Supreme Court of New York and was removed to the Federal District Court. The District Judge upon proof showing that the action against the general agent was not timely brought dismissed the suit. The Second Circuit reversed, stating that even though the suit against the agent was filed on the law side of the docket

and though not timely brought, nevertheless under Admiralty principles the harsh doctrine of limitation is not to be mechanically applied but the doctrine of laches controlled, stating as follows (p. 128):

> "The facts involved in this appeal present a problem maritime in its nature. The applicability of admiralty principles compels us to test the timeliness of the general agent action not by an arbitrary enforcement of the statute of limitations, but rather by the equitable doctrine of laches. While the analogous statute of limitations may be used as a yardstick passage of time alone will not bar an action for a maritime tort if the delay is excusable and the defendant is not prejudiced thereby. Kang v. U.S.S.R., 3 Cir., 1951, 189 F. (2d) 303, certiorari denied 1952, 342 U.S. 903, 72 S.Ct. 292, 96 L.Ed. 676; Gardner v. Panama R. Co., 1951, 342 U.S. 29, 72 S.Ct. 12, 96 L.Ed. 31; Czaplicki v. The Hoegh Silvercloud, 1956, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387.
>
> "When Congress made the timeliness of the action against the general agent a prerequisite to bringing suit against the United States under 46 U.S.C. Sec. 745, it raised the issue of laches in those cases in which the general agent's action was brought after the analogous statute of limitations had run. The disposition of the district court made it unnecessary for it to decide the question of laches. It is our opinion that the presence or absence of laches *in the action against Marine Transport Lines, Inc.*, should have been decided by the district court as the determinative issue in this case. See Czaplicki v. The Hoegh Silvercloud, 1956, 351 U.S. 525, 533-534, 76 S.Ct. 946, 100 L.Ed. 1387."

Since the errors in this case require a reversal it should be remanded for a trial on all issues, whether grounded on

unseaworthiness or negligence. It would be unfair to try this case piece-meal. As stated by Judge Burke in *LeGate* v. *The Panamolga*, 211 F. (2d) 689:

> "Since we must reverse for dismissing the claim based on unseaworthiness, we think it would be a harsh result to permit the suit to continue and at the same time limit the scope."

See also *Troupe* v. *Chicago D & G Bay Transit Co.*, 234 F. (2d) 253.

## PROPOSITION NUMBER THREE

**The District Court by its practice and procedure has altered and denied the rights of this litigant as those rights are established in federal law: the trial court's submission of issues Nos. 3 and 14 and definitions of "unseaworthy" effectively denied petitioner's right to recovery under the "unseaworthy" doctrine.**

### Argument and Authorities

#### The Court's charge denied petitioner his rights as a seaman under the maritime law.

Assuming that the trial court's erroneous, confusing and wholly unrealistic issues Nos. 3 and 14 and the definitions given in connection with them were proper under the Texas law—which, of course, they were not—the submission of issues 3 and 14 and definitions denied Petitioner his rights under the applicable Federal Law which is paramount and should be given uniform application throughout the nation. Obviously erroneous was the submission of issues 3 and 14 and definitions both under Federal and Texas Law.

It is obvious that Petitioner was prejudiced by the Court's submission of Special Issues Numbers 3 and 14 (R. 359-

362) and the definition of "unseaworthiness" as given by the Court, that is, instructing the jury that the term "unseaworthy" applies to the vessel *as a whole* rather than to the specific appurtenances i.e. windows on the deck above the galley made the basis of this suit. Such submission not only compelled the jury to answer Special Issues 3 and 14 "No," but prevented the jury, under the Court's specific instructions, from answering (proximate cause) issues 4 (R. 359) and 15 (R. 362) respectively. That the jurors were misled and confused by Special Issues Nos. 3 and 14 and definitions following such issues is evidenced by the question they sent out, as well as by the affidavits of the six jurors, one of whom was the foreman and at least one of whom, Mr. Byrd, was a retired Navy Officer of the United States who knew and understood ships.

Petitioner strenuously objected and excepted to Issues Nos. 3 and 14 and the definitions (R. 359 and 362) given because they compelled the jury to answer these two issues "No." Indeed, if the test of liability for unseaworthiness were that the defect of appliance causing injuries must be of such magnitude as to cause the vessel as a whole to be unfit for the purpose for which it is intended, then these issues should not have been submitted at all because no proof was offered to show any such fact. Petitioner's pleading and proof were directed to prove the breach of well established maritime rights and duties, his complaint being limited to the three windows over the stairs and the deck above the galley not being watertight, i.e., unseaworthy. Petitioner never contended that such defects made the crew ship *as a whole* unseaworthy. Thus, Issues 2 and 13 should have been followed by issues inquiring of the jury whether the portholes, or windows, not being watertight (Petitioner's requested Issue No. 3) (R. 371) and the deck above the galley not being watertight (Petitioner's requested

Issue No. 14)" (R. 373) were each a proximate cause of Petitioner's injuries. The Court refused to submit such issues but instead submitted Special Issues Numbers 3 and 14 reading as follows:

> "If you have answered the preceding special issue 'They were not,' then you will answer the following Special Issue, otherwise you need not answer."
>
> SPECIAL ISSUE NO. 3
>
> "Do you find from a preponderance of the evidence that the portholes, or windows, in question not being in a watertight condition, if you have so found in answer to Special Issue No. 2, made the *crewship* in question 'unseaworthy' as defined herein?"
>
> "You are instructed that the term 'unseaworthy' as used herein means that the vessel with its appliances and fittings is not reasonably fit for the purposes for which *it* is being used."
>
> "Answer 'Yes,' or 'No'". (R. 359).

The Court in exactly the same language submitted Special Issue 14 (R. 362), dealing with the deck above the galley. These issues, as submitted by the Court, imposed a greater burden upon the Petitioner than required by law in that it required him to prove that by reason of the windows and the deck above the galley not being watertight rendered the vessel *as a whole* unseaworthy.

The legal test is whether the windows or portholes on the port side and the deck above the galley not being watertight rendered such *particular windows* or the deck above the galley unseaworthy. *Campbell* v. *Tidewater Associated Oil Co.*, 1956 AMC 1377 at p. 1379-80. The duty imposed by the warranty of seaworthiness has been variously stated to be a duty that the *appurtenance in question*

on the ship not be "inadequate for the purpose for which it was ordinarily used" *Mahnich* v. *Southern Steamship Co.*, *supra*, and that the "Equipment (on the ship) be reasonably fit for the use for which it is intended" *Manhat* v. *U. S.*, 220 F.(2d) 143 at p. 148 (2 CA) cert. den. 349 U.S. 966. Obviously, the jury could not conclude as a *factual* matter that the defective condition of the portholes or windows made the ship as a whole unseaworthy. A jury composed of laymen, not familiar with nor instructed on the principle of unseaworthiness as applicable to the relationship of shipowner and seaman could easily conclude, as indeed the jury did here, that a ship can sail the Gulf of Mexico with windows and deck above the galley not watertight, indeed without any windows at all or without any deck over the galley, a vessel could be considered reasonably fit for the purpose for which it was being used, which in this instance was transporting drilling crew members to and from location in the Gu of Mexico, just like a vessel with two missing hatch covers, *Pope & Talbot* v. *Hawn*, 198 F.(2d) 800, 346 U.S. 406, 74 S.Ct. 202; a defective rope, *Mahnich* v. *Southern S.S. Co.*, 64 S.Ct. 455, 321 U.S. 96; a defective block, *Seas Shipping Co.* v. *Sieracki*, 149 F.(2d) 98, 328 U.S. 85, 66 S.Ct. 872; a defective door knob, *The H. A. Scandrett*, *Sellon* v. *Great Lakes Transit Corporation* (C.C.A. 2d Cir.), 87 F.(2d) 708; a defective ladder leading to and from the vessel to the dock, *United States* v. *Smith*, 220 F.(2d) 548; failure of lighting in a specific hatch, *Crawford* v. *Pope & Talbot*, 206 F.(2d) 784; the absence of a cover guard over a radiator, *Bentley* v. *Albatross Steamship Co.*, 203 F.(2d) 270; a defective handle on a hatchcover, *Lauro* v. *United States*, 162 F.(2d) 32; an unguarded part of a moving pump, *Seeandbee*, 102 F.(2d) 577, p. 581; the presence of grease on a ladder, *Oakes* v. *Graham Towing Company*, 135 F.Supp. 498, 1955 A.M.C. p. 1824; a seaman of vicious proclivities, *Keen* v. *Overseas Tankship Corp.*,

194 F.(2d) 515, cert. den., 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363; a defective block, *Petterson* v. *Alaska Shipping Co.*, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798; *Grillea* v. *United States*, 232 F.(2d) 919, C.C.A. 2d. 1956, and a host of others were as a factual matter reasonably fit for navigating. All of these individual defective conditions have been held, under the maritime law, to constitute unseaworthiness as a matter of law. None of the conditions hereinabove set out affected the vessel as a whole. Indeed, a vessel can be reasonably fit for the purpose of transporting cargo and still have a defective rope, a missing hatch cover, a missing guardrail, a missing cover guard over a radiator, a defective handle on a hatch cover, etc., yet, the Courts under the applicable Federal Law have held as a matter of law that such omissions or defects constitute unseaworthiness in law which, if proximately causing injury, entitle such seamen to compensatory damages.

To inquire of a jury whether a defective rope aboard a vessel with other good ropes aboard (*Mahnich* case), a defective handle to a hatch cover, a missing guard over a radiator, windows that are not watertight, or a deck over a galley not being watertight, etc., rendered the vessel as a whole unseaworthy from a factual standpoint, as was done in the case at Bar, would make a mockery of the doctrine of unseaworthiness. Such a contention is wholly unrealistic and not in keeping with the broad protection given American Merchant Seamen under the maritime law.

Even in our Federal Courts where cases such as these are submitted either on a general charge or by a general charge and special interrogatories under Rule 49 of the F.R.C.P., the jury is only asked to pass on disputed *facti* questions. It is true that under our Federal practice the Court instructs the jury generally on the applicable law and under such circumstances explains to the jury what is

meant by unseaworthiness, saying generally—"That by the term unseaworthiness is meant that the vessel and its equipment are not reasonably suited for the purpose for which they are intended," but then the Court instructs the jury that if they find a specific condition complained of as in this instance that the windows were not watertight, and/or the deck was not watertight, and such condition proximately caused the seaman's injuries, then such condition constitutes unseaworthiness and they must find for the plaintiff.

The latest and clearest principle of law applicable in such cases especially with reference to what constitutes "unseaworthiness" in law and the proper method of submitting such issues to the jury can be found in *Pope & Talbot* v. *Hawn*, 198 F.(2d) 800, affirmed 346 U.S. 406, 74 S.Ct. 202 and *Alaska Steamship Co.* v. *Petterson*, 205 F.(2d) 478, affirmed 347 U.S. 396, 74 S.Ct. 601.

In the *Petterson* case, *supra*, the Court of Appeals stated as follows:

> "If the block was being put to a proper use in a manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy. * * *
>
> "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561."

We respectfully call the Court's attention to the opinion of the Court of Appeals in the *Hawn* case in which that Court quotes with approval, the charge to the jury as follows:

> "Therefore, if you should find that at the time the S. S. 'JOHN DICKINSON' arrived in the port of Phila-

delphia and before the shore side workers commenced working on the vessel *two hatch covers were missing from the hatch* in the 'tween deck of the No. 4 hold *and that by reason thereof plaintiff fell* to the hold below *and was injured, your verdict should be for the plaintiff,* and against Pope & Talbot, Inc., even if you should also find that Pope & Talbot, Inc., was not guilty of negligence for any such case, the liability of Pope & Talbot, Inc., is absolute and does not depend upon its failure to exercise due care. * * * ".

Had the *Hauck* case been tried under the Texas Rules of Civil Procedure the issue propounded to the jury would have been as follows:

SPECIAL ISSUE NO. 1

"Do you find from a preponderance of the evidence that at the time the SS 'JOHN DICKSON' arrived in the port of Philadelphia and before the shoreside workers commenced working on said vessel, two hatch covers were missing from the hatch in the 'tween deck of the No. 4 hold?"

"Answer 'Yes' or 'No.'"

"If you have answered the preceding Special Issue 'Yes' then you will answer the following Special Issue, otherwise, you need not answer."

SPECIAL ISSUE NO. 2

"Do you find from a preponderance of the evidence that the missing two hatch covers in the 'tween deck of the No. 4 Hold, if you have so found, was a proximate cause of plaintiff's injury?"

An affirmative answer to these two issues would impose liability for the existence of the condition (missing hatch

covers) making that portion of the vessel unseaworthy as a matter of law.

The right to compensatory damages if a seaman is injured by reason of unseaworthiness is a federally created right as interpreted by the Federal Courts and must be so interpreted in the State Courts where the case is tried. Procedural matters which deny a seaman such federally created rights cannot be followed. *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 63 S.Ct. 246, in which the Court stated as follows:

> "This Court has specifically held that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules.' Panama R. Co. v. Johnson, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748. The Act is based upon and incorporates by reference the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, etseq., which also requires uniform interpretation. (Mondou v. New York, New Haven & Hartford Railroad Co.), 223 U.S. 1, 55 et seq., 32 S.Ct. 169, 177; 56 L.Ed. 327, 38 L.R.A., N.S., 44. This uniformity requirement extends to the type of proof necessary for judgment. New Orleans & N. E. R. Co. v. Harris, 247 U.S. 367, 38 S.Ct. 535, 62 L.Ed. 1167. * * *
>
> "* * * The source of the governing law applied is the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in Federal Law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all

substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."

In *Norfolk Southern Railroad Company* v. *Walter G. Ferebee*, 35 S.Ct. 781, 238 U.S. 269, this Court considered and held that a substantive right or defense arising under a Federal Statute cannot be destroyed or lessened by a local rule of practice, stating:

"But a substantive right or defense arising under the Federal Law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

In *Carlisle Packing Co.* v. *Sandanger*, 42 S.Ct. 475, 259 U.S. 255, this Court reaffirmed the principle of absolute liability of an unseaworthy appliance causing injury, stating as follows:

"* * * in the present cause, we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages."

This unquestionably has been and is the law. Later decisions have liberalized and extended the doctrine—*Seas*

*Shipping Company* v. *Sieracki, supra; Malinich* v. *Southern Steamship Co., supra; Alaska Steamship Co.* v. *Petterson*, 205 F.(2d) 478, 347 U.S. 396, 74 S.Ct. 601. *Poignant* v. *U. S.*, 225 F.(2d) 595. The trial court here, however, reversed the process and, instead of instructing the jury that a window that is not watertight causing water to spill on stairs upon which members of the crew must walk in the discharge of their duties makes the vessel—in legal contemplation—unseaworthy, asked the jury whether such condition made the vessel *as a whole* (the ship, crew) Issues Nos. 4 and 15 unseaworthy. Thus the jury was asked to pass upon a question of law, which in view of the Court's definition is so confusing that the jury sent out a question in writing for clarification which the Court refused to answer. Many more cases can be cited that a right based upon the Federal Law cannot be altered or denied by state procedure, *a fortiori* exists when the procedure brings on an erroneous application of the law and is confusing to the jury. *Balado* v. *Lykes Bros. Steamship Co., Inc.*, 179 F.(2d) 943 (Second Circuit), in which the Court stated as follows:

> " '[The owner owes each member of the crew, this plaintiff in particular, a seaworthy vessel, that is a vessel that is calculated to meet all the risks of its trip or voyage on which it sets out]. But he added: [you will have to determine whether she sailed with a sprung door and whether the defendant should have known the door was sprung. * * *]
>
> [If the vessel started out *with a door that was sprung or was otherwise inadequate to keep sea water from entering the crew's messroom*, and there was evidence from which a jury might find that the ship sailed in such a condition *and that the plaintiff's injuries were caused by it*, the owner was liable for sailing with *an unseaworthy* vessel irrespective of negligence or knowl-

edge of the condition of the vessel prior to her sailing. The H. A. Scandrett, 2 Cir., 87 F.(2d) 708. In the circumstances, *there is confusion as to the meaning of the charge and doubt* whether the judge did not intend to require the jury to find not only that the door was sprung before the ship sailed but also to find defendant ought to have known that the door was sprung before liability for unseaworthiness could be imposed.]' "

## CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that judgment of the District Court and the Court of Civil Appeals for the Fifth Supreme Judicial District be reversed and the case remanded to the trial court for trial on the issues of unseaworthiness and negligence.

Respectfully submitted,

MANDELL & WRIGHT
By ARTHUR J. MANDELL
*Attorneys for Petitioner*
707 South Coast Building
Houston 2, Texas